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EU Environmental Policy and the Civil Society

Jan H. Jans

I Introduction

The decision-making process in the EU finds its *formal* legitimacy, via the European Parliament and the Council, in elected representatives of the European people. As the European Parliament stated in its Resolution¹ on the *White Paper on Governance*²:

'Consultation of interested parties [...] can only ever supplement and never replace the procedures and decisions of legislative bodies which possess democratic legitimacy; only the Council and Parliament, as colegislators, can take responsible decisions on the context of legislative procedures [...].'

However, there is no contradiction between broad consultation and the concept of representative democracy. Therefore, in this contribution I will explore how environmental non-governmental organisations (ENGOS) can make a contribution to fostering a more participatory democracy and *substantive* legitimacy within the European Union. In this respect I recall in particular Article 34 of the Preliminary Draft Constitutional Treaty³ which sets out the principle of participatory democracy, by which the institutions are to ensure a high level of openness, permitting citizens' organisations of all kinds to play a full part in the Union's affairs.

The European Union is founded, as stated in Article 6 EU, on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. Principles which are common to the Member States. Of course, the right of individuals to form ENGOS to pursue a common (environmental) purpose is a fundamental freedom in any democracy. Increasingly ENGOS are recognised as a significant component of civil society and as providing valuable support for a more democratic system of government.⁴

The purpose of this contribution is two-fold. First of all, it aims to provide an overview of the existing legal relationships between EU environmental policy making and ENGOS. Secondly, it aims to suggest possible ways to improve and to strengthen this relationship. I will explore the role of ENGOS in the pre-proposal stage of policy making; their role during the formal decision-making process and their role after a formal legal act (directive or regulation) has been enacted.

¹ A5-0399/2001.

² COM(2001) 428 final. See for a critical appraisal of the White Paper Eriksen (2001).

³ CONV 369/02 of 28 October 2002.

⁴ Cf. Commission Discussion Paper 'The Commission and Non-Governmental Organisations: Building a Stronger Partnership'; COM (2000) 11 final, at 4.

2 The pre-proposal stage

2.1 General remarks

Consultation mechanisms form part of the activities of all European institutions throughout the whole legislative process, from policy-shaping prior to a Commission proposal to the final adoption of a measure by the legislature and its implementation. There are, according to the EC Treaty, institutionalised advisory bodies established especially to assist the Commission, the Parliament and the Council, namely the Economic and Social Committee and the Committee of the Regions. However, the role of these bodies does not exclude direct contact between the Commission and interest groups.

In fact, wide consultation is one of the Commission's duties according to the Treaties. Protocol No. 7 to the Amsterdam Treaty on the application of the principles of subsidiarity and proportionality states that 'the Commission should [...] consult widely before proposing legislation and, wherever appropriate, publish consultation documents'.

In this respect we should also note that the specific role of non-governmental organisations (NGOs) is closely linked to the fundamental right of citizens to form associations in order to pursue a common purpose, as highlighted in Article 12 of the Charter of Fundamental Rights of the European Union.

On the possible role of NGOs the Commission has expressed its view in a discussion paper entitled *The Commission and Non-Governmental organisations: Building a Stronger Partnership*.⁵ The paper signals a variety of problems:

- cooperation with NGOs is organised differently from one policy area to the next;
- internal Commission procedures are complex;
- there is a lack of funding, funding opportunities and information related to this;
- the Commission should provide better information for NGOs and improve communication with them as a means of building a true partnership.

Partly to overcome these problems the Commission has issued a Communication entitled *Towards a reinforced culture of consultation and dialogue* and has established some general principles and minimum standards for the consultation of interested parties by the Commission.⁶ In that Communication the following general principles are acknowledged:

- principle of participation;
- principle of openness and accountability;

⁵ See footnote 4.

⁶ COM (2002) 704 final.

- principle of effectiveness;
- principle of coherence.

With regard to minimum standards the Commission mentioned the following:

- Clear content of the consultation process; All communications relating to consultation should be clear and concise, and should include all necessary information to facilitate responses;
- Consultation target groups; When defining the target group(s) in a consultation process, the Commission should ensure that relevant parties have an opportunity to express their opinions;
- Publication; The Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences. Without excluding other communication tools, open public consultations should be published on the Internet and announced at the 'single access point';
- Time-limits for participation; The Commission should provide sufficient time for planning and responses to invitations and written contributions. The Commission should strive to allow at least 8 weeks for the reception of responses to written public consultations and 20 working days' notice for meetings.
- Acknowledgement and feedback; Receipt of contributions should be acknowledged. Results of open public consultation should be displayed on websites linked to the single access point on the Internet.

2.2 No legal obligation to consult ENGOS

What is the influence of 'civil society' on environmental policy making by the EU institutions? Legally speaking, there is none. Neither the Economic and Social Committee nor the Committee of the Regions – although both have close contacts with NGOs – can or should be regarded as representing the opinion of the public at large in the decision-making process.

Looking at matters from a legal perspective: dialogue and consultation between with NGOs and the Commission have to be seen within the framework of the decision-making procedures in general and for ENGOS within the framework of Article 175 EC in particular. The specific value of these consultations derives notably from the Commission's right of initiative. In other words: dialogue and consultation with ENGOS must be seen in the perspective of enhancing the quality of the Commission's proposals to the Council and the European Parliament.

ENGOS are clearly recognised as 'stakeholders' in developing European environmental policy making. Timely consultation with ENGOS at an early stage of policy-shaping is increasingly part of the Commission's practice of consulting

widely, in particular at the stage before formal proposals are submitted to the Council and the European Parliament.⁷

In this respect it should be noted that the EC signed⁸, in June 1998, the 'UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters', the so called *Aarhus Convention*. The Convention invites the Parties to promote public participation during the preparation of executive regulations and generally applicable legally binding normative instruments that may have a significant effect on the environment. Article 8 of the Convention reads:

'Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken:

- (a) Time-frames sufficient for effective participation should be fixed;*
- (b) Draft rules should be published or otherwise made publicly available; and*
- (c) The public should be given the opportunity to comment, directly or through representative consultative bodies.*

The result of the public participation shall be taken into account as far as possible.'

The words 'shall strive to promote' make it clear that this provision is somewhat less than 'hard and fast law'. Anyway, by signing the Convention the EC demonstrated its commitment to ensuring adequate consultation of the public in the process of shaping EC environmental policy. However, measures of the EC institutions to implement the international obligation of Article 8 Aarhus Convention have still to be taken.

2.3 Lessons to be learnt from the 'social dialogue'?

One way of enhancing the role of ENGOs would be to introduce into the EC Treaty a procedure which is similar to what is known as the *social dialogue*. According to Article 138 (1) EC the Commission has the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties. To this end, before submitting proposals in the social

⁷ See footnote 4, at 7.

⁸ But not yet ratified: see the proposal for a Council Decision on the signature by the European Community of the UN/ECE Convention on access to information, public participation and access to justice in environmental matters; COM/98/0344 final.

policy field, the Commission shall consult management and labour on the possible direction of Community action (para. 2 of Article 138 EC). If, after such consultation, the Commission considers Community action to be advisable, it shall consult management and labour on the content of the envisaged proposal (para. 3 of Article 138 EC). But then again, I am not convinced that a similar provision in the environment chapter of the EC Treaty would be a good idea after all. The legal obligation to consult without reservation seems to be rather rigid and not sufficiently flexible to accommodate the need for swift action, when environmental protection requirements so demand. However, the idea behind the *social dialogue* – i.e. to improve the legitimacy of measures by means of consultations with the relevant stakeholders in society – should be followed up in environmental policy making as well. But I do not see the necessity to include into the treaties a rigid legal obligation to do so. Of course there are other means to enhance a ‘European’ public debate on environmental affairs.

2.4 Green and White Papers

In particular, the Commission, by issuing ‘Green and White Papers’, can and does stimulate a public debate. Green Papers focus on a particular area of interest for which the Community has not yet produced legislation, for example the Green Paper on integrated product policy.⁹ Primarily, a Green Paper is designed to be a consultative document, addressed to interested parties, individuals, companies, and organizations, all of which are then invited to give their input to any possible future legislation. A time-limit is provided, by when the interested parties are required to submit their comments to the Commission. Usually, although not always, a Green Paper will lead to a Communication, which may lead to an actual proposal for legislation.

White Papers are used as vehicles for the development of policy in areas that have not yet come under existing legislation. The major difference between the two papers is that White Papers focus on broader areas that cover more than one industry, such as the White Paper on environmental liability.¹⁰ These are drawn up as a consequence of an analysis of important policy to the Union as a whole. Specific proposals for legislation may follow in the framework of a White Paper.

Furthermore, the Commission could organise and stimulate – in the pre-proposal stage – aspects like public hearings, society-wide discussions. Not on all, but on the important issues. As far as I can see there are no legal impediments in the current Treaties.

⁹ COM (2001) 68 final.

¹⁰ COM (2000) 66.

3 The decision-making process

3.1 Towards a general application of the co-decision procedure

'Amsterdam' has succeeded in making decision making in the context of the Title on the Environment less complex. The standard procedure is now, according to Article 175(1) EC, the *co-decision procedure*, as regulated in Article 251 EC.

Under this procedure the European Parliament is twice consulted on the measure proposed and has the ultimate power to prevent the adoption of a measure. Although co-decision does not automatically lead to more 'environmentally friendly' legislation, the fact that the co-decision procedure is now the standard decision-making procedure must nevertheless be welcomed.

However, the second paragraph of Article 175 EC states that:

'by way of derogation from the decision-making procedure provided for in Article 175 (1), the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

- (a) provisions primarily of a fiscal nature;*
- (b) measures affecting:*
 - town and country planning;*
 - quantitative management of water resources or affecting, directly or indirectly, the availability of those resources;*
 - land use, with the exception of waste management;*
- (c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.'*

Indeed, we have come a long way from decision making by unanimity under the 'old' Articles 100 (now Article 94 EC) and 235 (now Article 308 EC) EEC Treaty to majority voting and a strong role for the European Parliament under an explicit environment paragraph in the Treaty.¹¹ A final step in the emancipation of European Environmental Law is still to be taken. And that is that all European environmental measures should be subject to majority voting according to the co-decision procedure.

3.2 Openness and secrecy in the Council

A related issue is the question of secrecy during the decision-making process. In all Member States the legislator debates in public. Public debate therefore has a very important role in providing legitimacy for legisla-

¹¹ See on this development Jans (2000), Chapter I.

tive acts. The following question had been raised: should the Council meet and debate in public? The impetus to a positive answer to this question has been provided by the Praesidium of the European Convention. In Article 36 of the Preliminary Draft Constitutional Treaty¹² a provision on ‘Transparency of the Union’s legislative debates’ is added which should establish the rule that the legislative debates of the European Parliament and of the Council in its legislative form shall be public. I would indeed welcome such a provision. Of course this provision would not only be applicable to decision making on environmental protection, but instead it should have a general scope.

3.3 Delegated decision making

Not unimportant in practical terms are the *comitology* procedures. Apart from the decision-making procedures referred to in the Treaty, many standards are set – especially technical standards – by means of delegated legislation.¹³ The legal basis for *comitology* in the EC Treaty can be found in Article 202, third indent:

‘To ensure that the objectives set out in this Treaty are attained the Council shall, in accordance with the provisions of this Treaty:

[...]

– confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down.

The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament’.

The ‘principles and rules’ mentioned in the final sentence of this provision have been laid down in what is being called the Second Comitology Decision.¹⁴

¹² CONV 369/02 of 28 October 2002.

¹³ OJ 1999 L 184/23.

¹⁴ Decision 1999/468, OJ 1999 L 184/23; see also the Proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission; COM(2002) 719 final. Cf. on the duty to give reasons if and when the institutions want to derogate from the criteria in the Second Comitology Decision: ECJ judgment of 21 January 2003, Case C-378/00 *Commission v. Council and EP*, not yet reported in the ECR. The judgment concerned the partial annulment of Regulation 1655/2000 on a financial instrument for the environment.

Delegated decision making, in particular concerning technical standard setting, is quite common in European environmental law. One example is the Waste Directive.¹⁵ This directive contains a number of annexes describing categories of waste, disposal operations and operations which may lead to recovery. Amendments to these annexes are made by means of a committee procedure set out in the directive. This requires a representative of the Commission to submit to the committee a draft of the measures to be taken. The committee must then deliver its opinion on the draft within a given time-limit. If the measures envisaged are in accordance with the opinion, the Commission will adopt the measures. If they are not, the Commission must submit a proposal to the Council, which can then act by a qualified majority. However, if the Council has not acted within a period of three months, the proposed measures will be adopted by the Commission. Other directives on the environment also provide for committee procedures, which may or may not be similar.¹⁶

The judgment in Case C-378/00, already mentioned in this paper, makes it clear that the criteria of the Second Comitology Decision make clear that the institutions are free to derogate from them, provided they give reasons as to why such a derogation is necessary. Therefore, if and when for environmental reasons the EC institutions feel that it is necessary to derogate from the criteria of the Second Comitology Decision, there is no legal impediment to doing so. There is only a legal duty to give reasons as to why this is necessary. In view of this, I do not see any particular reason either to amend the Second Comitology Decision or Article 202 EC itself, just for environmental reasons.

3.4 Access to information

Access to the environmental information of the institutions is first of all dealt with in Article 255 EC. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents. This right, however, is subject to 'general principles and limits on grounds of public or private interest governing this right of access'. These principles have been laid down by Regulation 1049/2001 of the Council, Commission and EP.¹⁷

One major problem regarding access to environmental information concerns the practice of the Commission not to make available to interested citizens information regarding the use of infringement-proceedings against the member

¹⁵ Directive 75/442, OJ 1975 L 194/47, later amended.

¹⁶ See for instance Directive 94/67 on the incineration of hazardous waste, OJ 1994 L 365/34, Article 16.

¹⁷ OJ 2001, L 145/43.

states.¹⁸ The legal basis for such a refusal can be found in Article 4 (2) second and third indent of Regulation 1049/2001:

‘The institutions shall refuse access to a document where disclosure would undermine the protection of:

- [...]

 - court proceedings and legal advice,*
 - the purpose of inspections, investigations and audits,*
 - unless there is an overriding public interest in disclosure.’**

The alternative route via the Member States will, in general, not be available to ENGOs either. The reason for this is that Article 5 of Regulation 1049/2001 states the following:

‘Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.’

The Member State may instead refer the request to the institution.’

Although the case law of the CFI prior to the enactment of Regulation 1049/2001 seems to indicate that these restrictions are within the law¹⁹, we have to point to a relevant development in the Aarhus Convention. Article 4 (4) (c) provides that

‘a request for environmental information may be refused if the disclosure would adversely affect

[...]

The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature’.

This clause does not seem to include restrictions as practised by the Commission regarding documents pertaining to environmental infringement proceedings.

Finally, I note that Article 255 EC speaks of access to documents of the Commission, Council and EP. I would favour broadening the addressees of this Treaty obligation to all ‘organs’ and ‘institutions’ and it should therefore include

¹⁸ Cf. on this Krämer (2003).

¹⁹ Case T-105/95 *WWF v. Commission* [1997] ECR II-313 and Case T-191/99 *Petrie a.o. v. Commission* [2001] ECR II-3677.

the Economic and Social Committee, the Committee of the Regions, the European Central Bank etc.

4 Access to the ECJ and CFI²⁰

We all know how complicated the admissibility is of ENGOs objecting to EC Directives and Regulations on *environmental* grounds. The reason for all this: the requirement under Article 230 (4) EC of *direct and individual concern*, as it has been interpreted by the ECJ for many years.²¹

The leading 'environmental' case on the admissibility of interested third parties trying to annul decisions affecting the environment is still the *Greenpeace* case.²²

This case concerned two power stations on the Canary Islands, for which no environmental impact assessment had been prepared. Greenpeace had appealed against a decision of the Court of First Instance.²³ That Court had declared Greenpeace's action seeking annulment of a Commission decision to pay the Spanish Government ECU 12 million from the European Regional Development Fund for the construction of the two power stations inadmissible.

The Court of First Instance had reached this decision referring to the determined case law of the Court of Justice according to which persons other than the addressees may claim that a decision is of direct concern to them only if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same way as the person addressed.

Accordingly, the CFI held that the criterion proposed by the applicants for appraising their *locus standi*, namely the existence of harm suffered or to be suffered, was not in itself sufficient to confer *locus standi* on an applicant. This was because such harm might affect, in a general abstract way, a large number of persons who could not be determined in advance in such a way as to distin-

²⁰ The relations between ENGOs and the Commission pertaining to infringements of European law by the Member States falls outside the scope of this paper. See on this the Communication of the Commission 'Relations with the Complainant in Respect of Infringements of Community Law'; COM(2002) 141 final and also COM(2002) 725 final / 2 'Sur l'amélioration du contrôle de l'application du droit communautaire'.

²¹ Case 25/62 *Plaumann* [1963] ECR 95.

²² Case C-321/95 P *Greenpeace v. Commission* [1998] ECR I-1651.

²³ Case T-585/93 *Greenpeace v. Commission* [1995] ECR II-2205. Cf. also Case T-117/94 *Associazione Agricoltori della Provincia di Rovigo and Others v. Commission* [1995] ECR II-455 and Case C-142/95 P *Associazione Agricoltori della Provincia di Rovigo and others v. Commission* [1996] ECR I-6669.

guish them individually just like the addressee of a decision, as required under the determined case law mentioned above. There was thus no question of a special regime of *locus standi* in respect of Community environmental decisions, reflecting the public function of the environment.

As far as the *locus standi* of the organization Greenpeace was concerned, the Court of First Instance observed that an association formed for the protection of the collective interests of a category of persons could not be considered to be directly and individually concerned, for the purposes of Article 230 EC, by a measure affecting the general interests of that category, and was therefore not entitled to bring an action for annulment where its members could not do so individually. On appeal the Court of Justice upheld the decision of the Court of First Instance.

The result of this case law of the ECJ is that in general ENGOs do not have *locus standi* at the ECJ to challenge Regulations and Directives.

However, the CFI in the *Jégo-Quéré* case reconsidered its position on the strict interpretation of the notion of 'individual concern' under Article 230 EC and developed a new test to be applied:²⁴

'a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard'.

The new doctrine did not survive for very long. The ECJ delivered judgment in Case C-50/00 P *Unión de Pequeños Agricultores v. Council*²⁵ and this judgment shows that the strict interpretation of 'direct and individual concern' is still very much at the centre of Article 230 (4) EC. *Locus standi* for ENGOs to challenge at the ECJ environmental regulations and directives would require, in the light of the *UPA* judgment, an amendment of the EC Treaty. We suggest that the ECJ's invitation should be followed. Probably the 'easiest' way to bring Article 230 (4) more in line with Article 47 Charter of Fundamental Rights of the European Union and Articles 6 and 13 of the European Convention on Human Rights is to delete the words 'and individual'.

²⁴ Case T-177/01 *Jégo-Quéré* [2002] ECR II-2365.

²⁵ Case C-50/00 P *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677.

5 Concluding remarks

Many improvements to fostering participatory democracy within the European Union in general and European environmental law in particular can be made within the current Treaty provisions. In many cases it is just a matter of doing 'the right thing' and in others it is sufficient that changes in secondary legislation are made effective.

However, some necessary improvements do require an amendment of the Treaties. It is the author's opinion that:

- the co-decision procedure under Article 175 (1) EC should be the one and only applicable procedure for legislative acts to protect the environment;
- the words 'and individual' in Article 230 (4) EC should be deleted in order to improve legal protection;
- a provision similar to Article 36 of the Preliminary Draft Constitutional Treaty should be inserted in a future Constitutional Treaty in order to ensure that the legislative debates of the European Parliament and of the Council in its legislative form shall be public;
- Article 255 EC should be amended in such a way as to guarantee that access to information from all EU 'organs' and 'institutions' is ensured.